



DUE PROCESS

INSTITUTE

September 20, 2022

The Honorable Jerrold Nadler
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
2142 Rayburn House Office Building
Washington, DC 20515

RE: Terry Technical Correction Act, H.R. 5455

Chairman Nadler and Ranking Member Jordan,

Due Process Institute— a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system—strongly encourages Members of the House Committee on the Judiciary to support the Terry Technical Correction Act, H.R. 5455.

Both the Fair Sentencing Act and the First Step Act were incredibly important pieces of bipartisan sentencing reform legislation that made important changes to reduce a glaring inequity in federal drug sentencing. In light of the Supreme Court’s holding in *Terry v. United States* (2021),¹ however, Congress must act to ensure that justice is being equally and consistently applied as it intended through these legislative enactments.

In 2010, Congress passed the Fair Sentencing Act, which, among other things, reduced the sentencing disparity between certain crack and powder cocaine offenses (from 100:1 to 18:1). In 2018, through Section 404 of the First Step Act, Congress revisited the Fair Sentencing Act by making these changes in the law retroactive, allowing judges to revisit and reduce sentences for people who had already been sentenced when the Fair Sentencing Act was originally passed.

In 2008, prior to passage of either the Fair Sentencing Act or the First Step Act, Tarahrick Terry, a 20-year-old at the time of his sentencing who had suffered from addiction since he was 14, was convicted of possessing with intent to distribute a small amount of crack cocaine (3.9 grams) under 21 U.S.C. § 841(b)(1)(C). This amount was less than the amount that triggered a five-year mandatory minimum prison sentence at the time; however, at the time of Terry’s sentencing, the 100:1 sentencing disparity between crack and powder cocaine offenses still increased sentences for quantities below those that triggered mandatory minimum sentences. In addition, since Terry had two previous state court drug convictions during his teenage years—offenses for which he had served 120 days in prison—the federal court treated Terry as a “career offender,” sentencing him to nearly 16 years in federal prison for possessing 3.9 grams of crack cocaine. Terry did not appeal his conviction or his sentencing.

¹ 593 U.S. ____ (2021).

After Congress passed the Fair Sentencing Act to significantly lessen the unjust federal crack cocaine sentencing laws, Terry sought a resentencing but was unsuccessful because his 16-year sentence had technically been based on his “career offender” status, not on the quantity of drugs involved in his conviction. However, had Terry been convicted after the Fair Sentencing Act passed, even sentenced under the “career offender” enhancement he likely would have received less prison time.

After Congress enacted the First Step Act eight years later, Terry again sought resentencing, but the federal courts hearing his case determined that only those convicted of the more serious crack cocaine offenses that triggered mandatory minimum prison sentences under § 841(b)(1)(A) or § 841(b)(1)(B) were eligible for a sentence reduction, not people like Terry who were convicted of a crack cocaine offense under subparagraph (C). In June 2021, the U.S. Supreme Court agreed with those courts based on a technical drafting issue, despite the fact that the bipartisan sponsors of the First Step Act urged them in an *amicus* brief to hold that the Act made retroactive relief broadly available to *all* individuals sentenced for crack cocaine offenses before the Fair Sentencing Act. In her concurrence, Justice Sonia Sotomayor pointed out the injustice of the unique situation those like Terry find themselves in:

“If Terry had been convicted under § 841(b)(1)(A) or § 841(b)(1)(B), **which require larger quantities of drugs**, he would be eligible for resentencing under the First Step Act (even if sentenced as a career offender). Similarly, despite being convicted under subparagraph (C), if Terry’s Sentencing Guidelines range had been calculated like that of a noncareer offender, he would have been eligible for a sentence reduction when the United States Sentencing Commission retroactively reduced the amount of crack cocaine necessary to trigger higher Guidelines ranges. **But because Terry was both convicted under subparagraph (C) and sentenced as a career offender, he has never had a chance to ask for a sentence that reflects today’s understanding of the lesser severity of his crime. Absent action from the political branches, he never will There is no apparent reason that . . . [people like Terry] should be left to serve out sentences that were unduly influenced by the 100-to-1 ratio Fortunately, Congress has numerous tools to right this injustice.**” *Terry v. United States*, 593 U. S. ____ (2021) (emphasis added).

The Terry Technical Correction Act would simply clarify that the First Step Act sentencing reforms were meant to apply to individuals convicted under 21 U.S.C. § 841(b)(1)(C), as well as other low-level offenses.² The bill has broad bipartisan support and was introduced by Sens. Dick Durbin (D-IL), Chuck Grassley (R-IA), Cory Booker (D-NJ), Mike Lee (R-UT), Rand Paul (R-KY), and Amy Klobuchar (D-MN) in the Senate and Reps.

² *E.g.*, 5 U.S.C. § 3113, 21 U.S.C. § 844(a), 21 U.S.C. § 846, 21 U.S.C. § 848, 21 U.S.C. § 849, 21 U.S.C. § 859, 21 U.S.C. § 860, 21 U.S.C. § 861, 21 U.S.C. § 960(b)(3), 21 U.S.C. § 960a, 34 U.S.C. § 12522, 46 U.S.C. § 70503, and 46 U.S.C. § 70506.

Sheila Jackson Lee (D-TX), Jerrold Nadler (D-NY), David Cicilline (D-RI), Burgess Owens (R-UT), and Thomas Massie (R-KY) in the House.

Due Process Institute strongly urges the Committee to successfully markup the Terry Technical Correction Act, H.R. 5455. If your staff has any questions about our support of this bill, please email me at jason@idueprocess.org.

Sincerely,

Jason Pye
Director, Rule of Law Initiatives
Due Process Institute

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system.